

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
HAWAIIAN ELECTRIC COMPANY, INC. ) DOCKET NO. 2013-0423  
For Waiver of the Na Pua Makani )  
Wind Project from the Framework for )  
Competitive Bidding, and Approval )  
of the Power Purchase Agreement for )  
Renewable As-Available Energy with )  
Na Pua Makani Power Partners, LLC. )  
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ORDER NO. **37074**

DENYING LIFE OF THE LAND'S MOTION FOR RELIEF FROM  
ORDER NO. 32600 FILED ON SEPTEMBER 11, 2019

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_____ )	)	

DENYING LIFE OF THE LAND'S MOTION FOR RELIEF FROM  
ORDER NO. 32600 FILED ON SEPTEMBER 11, 2019

By this Order,<sup>1</sup> the Public Utilities Commission ("Commission") denies LOL's Motion for Relief From Order No. 32600" filed September 11, 2019 ("Motion for Relief") for the reasons set forth herein.<sup>2</sup> However, while the Commission denies LOL's Motion

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<sup>1</sup>The Parties to this docket are HAWAIIAN ELECTRIC COMPANY, INC. ("HECO") and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate"), an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes § 269-51 and Hawaii Administrative Rules ("HAR") § 16-601-62(a). In addition, the Commission has granted LOL participant status. Order No. 31998, "(1) Identifying Issues; (2) Granting Participant Status in Lieu of Intervention to Life of the Land; (3) Denying the Motion to Intervene of Mekanai Pono'o Kahuku; and (4) Instructing the Parties and Participant to File a Proposed Stipulated Procedural Order," filed March 21, 2014.

<sup>2</sup>"Life of the Land's Motion for Relief from Order No. 32600; Memorandum in Support; Declaration of Henry Q. Curtis;

based on the legal grounds asserted in the Motion, the Commission is carefully monitoring the Project development and intends to follow up with HECO and Pua Makani, outside of this proceeding, to inquire whether any violations of the PPA have occurred, and if so, will take appropriate action.

I.

BACKGROUND

A.

Relevant Procedural History

On December 12, 2013, HECO filed an application seeking approval for: (1) a power purchase agreement ("PPA")<sup>3</sup> with Na Pua Makani ("NPM"), under which HECO would purchase electrical energy from a wind energy facility to be owned and operated by NPM on an as-available basis; (2) a waiver from the requirements of the Competitive Bidding Framework for the PPA; and (3) construction of an above ground extension of a 46 kilovolt ("kV")

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Exhibits '01-'03,' and Certificate of Service," filed September 11, 2019.

<sup>3</sup>The PPA between HECO and NPM was approved by D&O 32600 on December 31, 2014. Subsequently, on September 15, 2016, HECO filed an amended version of the PPA. For purposes of analyzing LOL's Motion for Relief, the differences between the December 31, 2014 PPA and the September 15, 2016 amended PPA are not relevant, and throughout this Order, the Commission shall simply refer to the "PPA" for the sake of simplicity.

sub-transmission line to interconnect the NPM facility to HECO's electrical system.<sup>4</sup>

On March 21, 2014, the Commission issued Order No. 31998, in which the Commission denied LOL's request for intervenor-party status, but ruled that LOL could be a Participant regarding the issues of: (1) whether the Commission should approve HECO's request for a waiver of the PPA from the Competitive Bidding Framework; and (2) whether the purchased power arrangements under the PPA are prudent and in the public interest.<sup>5</sup>

On December 31, 2014, the Commission issued Decision and Order No. 32600 ("D&O 32600"), which, in relevant part: (1) approved HECO's request for a waiver from the Competitive Bidding Framework for the PPA with NPM; and (2) approved, with modifications, the PPA between HECO and NPM.

On October 13, 2017, the Commission issued Decision and Order No. 34866, which approved HECO's remaining request to construct an above ground 46 kV sub-transmission line to interconnect the NPM facility to HECO's system and closed the docket.

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<sup>4</sup>"Hawaiian Electric Application; Exhibits 1-8; Verification; and Certificate of Service," filed December 12, 2013 ("Application").

<sup>5</sup>Order No. 31998 at 4 and 17-21.

On September 11, 2019, LOL filed its Motion for Relief, seeking relief from D&O 32600 pursuant to Hawaii Rules of Civil Procedure ("HRCF") Rule 60(b).

On September 13, 2019, the Commission issued Order No. 36515 by which the Commission, on its own motion, extended the deadlines to file response to LOL's Motion for Relief to thirty days from the date of Order No. 36515.<sup>6</sup>

On October 15, 2019, pursuant to Order No. 36515, HECO submitted a memorandum in opposition to LOL's Motion for Relief and the Consumer Advocate submitted a response to LOL's Motion for Relief.<sup>7</sup>

On October 30, 2019, LOL submitted a motion seeking leave to file replies in response to HECO's Opposition and the Consumer Advocate's Response.<sup>8</sup>

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<sup>6</sup>Order No. 36515, "Extending on Its Own Motion the Deadline for Hawaiian Electric Company, Inc. and the Division of Consumer Advocacy to File their Respective Responses to Life of the Land's Motion For Relief From Order No. 32600, Entered on December 31, 2014," filed September 13, 2019 ("Order No. 36515").

<sup>7</sup>"Hawaiian Electric Company, Inc.'s Memorandum in Opposition to Life of the Land's Motion for Relief from Order No. 32600, Entered on December 31, 2014; Declaration of Randall C. Whattoff; Exhibit 1; and Certificate of Service," filed October 15, 2019 ("HECO Opposition"); and "Division of Consumer Advocacy's Response to Life of the Land's Motion for Relief from Order No. 32600," filed October 15, 2019 ("CA Response").

<sup>8</sup>"Motion for Leave to File (1) Reply to Consumer Advocate's Response and/or (2) Reply to HECO's Memorandum in Opposition; and Certificate of Service," filed October 30, 2019 ("LOL Motion for Leave").

That same day, the Commission issued: (1) a Notice of Hearing for LOL's Motion for Relief, setting the hearing for November 22, 2019, at the Commission's hearing room; and (2) Order No. 36715, in which the Commission set forth the rules and procedures that would govern the hearing.<sup>9</sup>

On November 12, 2019, the Commission issued Order No. 36754, which granted LOL's Motion for Leave, allowing it to file replies to HECO's Opposition and the Consumer Advocate's Response, but also allowing HECO and the Consumer Advocate to submit replies to LOL's reply.<sup>10</sup>

On November 14, 2019, consistent with Order No. 36754, LOL submitted replies to HECO's Opposition and the Consumer Advocate's Response.<sup>11</sup>

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<sup>9</sup>"Notice of Hearing on Life of the Land's Motion for Relief from Order No. 32600," Filed on September 11, 2019," issued October 30, 2019; and Order No. 36715, "Regarding the Hearing on Life of the Land's Motion for Relief Filed on September 1, 2019," filed October 30, 2019.

<sup>10</sup>Order No. 36754, "Granting Life of the Land's Motion for Leave to File (1) Reply to Consumer Advocate's Response and/or (2) Reply to HECO's Memorandum in Opposition Filed October 30, 2019; and Granting, on the Commission's Own Motion, Hawaiian Electric Company, Inc. and the Consumer Advocate an Opportunity to Submit Reply Briefing," filed November 12, 2019 ("Order No. 36754").

<sup>11</sup>"Life of the Land's Reply to Hawaiian Electric Company's Memorandum in Opposition," filed November 14, 2019 ("LOL HECO Reply"); and "Life of the Land's Reply to Division of Consumer Advocacy's Response to Life of the Land's Motion for Relief from Order [sic]," filed November 14, 2019 ("LOL CA Reply").

On November 19, 2019, consistent with Order No. 36754, HECO and the Consumer Advocate filed replies to LOL's respective replies.<sup>12</sup>

On November 22, 2019, consistent with the Notice of Hearing, the Commission held an oral hearing on LOL's Motion for Relief at the Commission's hearing room located at the Commission's Honolulu office.

As all scheduled briefing has been filed and the oral hearing on LOL's Motion for Relief was concluded on November 22, 2019, this matter is ready for decision making.

B.

Positions of the Parties and Participant

The respective positions of the Parties and Participant on LOL's Motion for Relief are set forth in briefings identified above. For purposes of this Order, the Commission summarizes their pertinent arguments below.

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<sup>12</sup>"Hawaiian Electric Company, Inc.'s Reply Memorandum to Life of the Land's Reply to Hawaiian Electric Company's Memorandum in Opposition to Life of the Land's Motion for Relief from Order No. 32600, Entered December 31, 2014; and Certificate of Service," filed November 19, 2019 ("HECO Reply"); and "Division of Consumer Advocacy's Reply to Life of the Land's Reply to the Division of Consumer Advocacy's Response to Life of the Land's Motion for Relief from Order," filed November 19, 2019 ("CA Reply").

1.

LOL

LOL seeks relief from D&O 32600, but states that the Commission's administrative rules do not address motions for relief. Accordingly, LOL contends that the Commission should turn to the HRCF for guidance, particularly, HRCF 60(b)(4)-(6).<sup>13</sup>

HRCF 60(b) provides, in relevant part, that "the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons . . . .

- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) any other reason justifying relief from the operation of the judgment.

LOL supports its Motion for Relief with the following arguments:

(A) D&O 32600 is void under HRCF 60(b)(4) due to NPM's failure to timely obtain site control (i.e., receive an Incidental Take License) required under Section 11.2 of the PPA;<sup>14</sup>

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<sup>13</sup>LOL Motion for Relief at 5 (citing HAR § 16-601-1).

<sup>14</sup>In its Motion for Relief, LOL states "Under HRCF Rule 60(b)(4), the Commission's Order is void due to NPM's failure to obtain site control as required under section 11.2 of the



(B) Under HRCP 60(b)(5), it is no longer equitable for D&O 32600 to have prospective application because the Commission did not consider greenhouse gas ("GHG") emissions, which deprived LOL of its property interests in a clean and healthful environment, as defined by HRS § 269-6(b), without due process of law;<sup>15</sup>

(C) Based on the circumstances underlying LOL' claims for relief under HRCP 60(b)(4) and (5), relief under HRCP 60(b)(6) is also warranted.<sup>16</sup>

In addition, LOL argues: (1) that because the PPA was granted pursuant to a waiver from the Competitive Bidding Framework, a failure to adhere to the conditions of the PPA should be strictly construed against HECO;<sup>17</sup> and (2) the energy pricing under the PPA is unreasonable.<sup>18</sup>

In its Motion for Relief, LOL begins by arguing that D&O 32600 is void under HRCP(b)(4) because: (1) NPM failed to obtain site control as required under Section 11.2 of the PPA;

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Application." LOL Motion for Relief at 5 (emphasis added). The Commission assumes LOL means "section 11.2 of the PPA."

<sup>15</sup>While LOL initially references HRS § 269-6(b) as the basis for its HRCP 60(b)(5) arguments, LOL alternatively cites HRS § 269-6(b) as the basis for its HRCP 60(b)(4) argument, as well as for a generalized due process argument. See LOL Motion for Relief at 5 and 8-9.

<sup>16</sup>LOL Motion for Relief at 5.

<sup>17</sup>LOL Motion for Relief at 7-8.

<sup>18</sup>LOL Motion for Relief at 10.

and (2) the “[c]ommission did not conduct analyses required under HRS § 269-6(b). . . .”<sup>19</sup>

Failure to obtain site control. LOL contends that D&O 32600 was premised on representations that NPM would obtain site control (i.e., obtain an Incidental Take License) by a certain date specified in the PPA (i.e., December 10, 2016).<sup>20</sup> Because NPM did not receive an Incidental Take License from BLNR until May 16, 2018, LOL argues that this constitutes a failure to comply with the approved terms of the PPA and voids the Commission’s approval of the PPA.<sup>21</sup>

LOL argues that these arguments could not have been remedied through a timely motion for reconsideration of D&O 32600 because LOL needed to wait until the May 15, 2018 deadline for NPM to obtain the Incidental Take License (i.e., approximately 150 days after D&O 32600 was issued) before it could determine whether the PPA had been breached.<sup>22</sup>

In addition, LOL argues that NPM’s delay in obtaining the Incidental Take License violated the “site control” provisions

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<sup>19</sup>LOL Motion for Relief at 5.

<sup>20</sup>LOL Motion for Relief at 5-7.

<sup>21</sup>LOL Motion for Relief at 7.

<sup>22</sup>LOL Motion for Relief at 7.

of the Competitive Bidding Framework.<sup>23</sup> LOL notes that HECO sought a waiver from the Competitive Bidding Framework for the PPA and, consequently, “[t]he Commission’s approval of this waiver means that [HECO] and NPM’s adherence to representations to the Commission, including as to the [PPA’s] land rights requirements, are to be strictly construed.”<sup>24</sup> Accordingly, “[HECO] and NPM’s failure to adhere to conditions of this Commission’s approval of the [PPA] should be construed strictly as void by its own terms.”<sup>25</sup>

HRS § 269-6(b) analyses. LOL also argues that D&O 32600 is void because the Commission did not explicitly address GHG emissions in D&O 32600, as required by HRS § 269-6(b). In particular, LOL states that D&O 32600 does not contain an analysis of GHG emissions, as required by HRS § 269-6(b).<sup>26</sup> As a result, LOL argues that it was prejudiced by the conduct of the proceedings, which did not protect LOL’s constitutional right to a clean and healthful environment.<sup>27</sup>

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<sup>23</sup>LOL Motion for Relief at 7-8 (citing Competitive Bidding Framework, Part IV.B.8)

<sup>24</sup>LOL Motion for Relief at 8.

<sup>25</sup>LOL Motion for Relief at 8.

<sup>26</sup>LOL Motion for Relief at 8-9.

<sup>27</sup>LOL Motion for Relief at 9.

In addition to supporting relief under HRCP 60(b)(4), LOL concludes that these circumstances also support relief pursuant to "HRCP Rule 60(b)(5) and (60)[sic]." <sup>28</sup>

In addition, LOL argues that "[t]oday wind energy is purchased at \$0.02 per kW-hour[,]" and thus, "[t]he pricing approved by [D&O 32600] is not reasonable and is against the public interest." <sup>29</sup>

Finally, LOL requested a hearing on its Motion for Relief, as well as a contested case hearing involving "explicit consideration of the greenhouse gas emissions consequent to the NPM facility under HRS § 269-6(b)." <sup>30</sup>

## 2.

### HECO

HECO argues that LOL's Motion for Relief should be denied on procedural grounds; although, HECO further argues that LOL's Motion for Relief fails on the merits as well. Procedurally, HECO argues that the Commission lacks jurisdiction over LOL's Motion for Relief based on LOL's failure to timely file an appeal

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<sup>28</sup>LOL Motion for Relief at 10. See also, id. at 5 ("Alternatively, under HRCP Rule 60(b)(6), these circumstances are also grounds justifying relief from the Order.").

<sup>29</sup>LOL Motion for Relief at 10. The levelized pricing of the PPA is \$0.14998 per kW-hour. D&O 32600 at 21.

<sup>30</sup>LOL Motion for Relief at 10-11.

of D&O 32600. Alternatively, HECO argues that none of the subsections of HRCP 60(b) apply to these circumstances.<sup>31</sup>

HECO's procedural arguments. HECO argues that LOL's failure to timely file an appeal of D&O 32600 divests the Commission of jurisdiction to hear LOL's Motion for Relief. HECO relies on the Hawaii appellate case of Tanaka v. Department of Hawaiian Home Lands, 106 Hawaii 246, 103 P.3d 406 (Ct. App. 2004) for support.<sup>32</sup> Under Tanaka, HECO contends that a party's failure to timely request judicial review of an agency decision divests the agency of jurisdiction to hear further matters related to the underlying case.<sup>33</sup> Because LOL failed to timely appeal D&O 32600 within the statutorily prescribed thirty days,<sup>34</sup> HECO argues that the Commission lacks jurisdiction to hear LOL's Motion for Relief, which seeks agency review of D&O 32600.<sup>35</sup>

HECO further argues that LOL's reliance on HRCP 60(b) is improper.<sup>36</sup> Regarding HRCP 60(b)(4), HECO contends that a judgment

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<sup>31</sup>HECO Opposition at 1-2.

<sup>32</sup>HECO Opposition at 5-6.

<sup>33</sup>See HECO Opposition at 5-7.

<sup>34</sup>See Hawaii Rules of Appellate Procedure ("HRAP") 4(a)(1).

<sup>35</sup>See HECO Opposition at 7.

<sup>36</sup>While LOL's Motion for Relief only asserted relief pursuant to HRCP 60(b)(4)-(6), HECO's Opposition includes arguments addressing subsections (b)(1)-(3) as well. Regarding HRCP 60(b)(1)-(3), HECO argues that they are all barred by the

can be only be void if "the court that rendered it lacked jurisdiction of either the subject matter or the parties or otherwise acted in a manner inconsistent with due process."<sup>37</sup> HECO states that neither situation is present here, as "it is indisputable that the Commission had personal and subject matter jurisdiction over the issues and parties in [D&O 32600,]" and that "any due process challenge was waived when . . . LOL failed to follow the proper procedural mechanism for making such a challenge."<sup>38</sup>

Regarding HRCP 60(b)(5), HECO asserts that LOL is time-barred from relying on these provisions, as LOL's Motion for Relief was not brought within a "reasonable time."<sup>39</sup> HECO acknowledges that the determination of a "reasonable time" is based on the attendant circumstances, but contends that LOL's delay

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one-year time limit set forth in HRCP 60(b). HECO Opposition at 8 (citing HRCP 60(b)).

<sup>37</sup>HECO Opposition at 10 (citing LOL Motion for Relief at 7; and In re Genesys Data Techs., Inc., 95 Hawaii 33, 38, 18 P.3d 895, 900 (2001)).

<sup>38</sup>HECO Opposition at 11. (citing HRS §§ 269-2, -6(a), -16; Molinary v. Powell Mountain Coal Co., Inc., 76 F.Supp.2d 695, 701 (W.D. Va. 1999); and Suesz v. St. Louis-Chaminade Ed. Ctr., 1 Haw.App. 415, 417, 619 P.2d 1104, 1106 (1980)).

<sup>39</sup>HECO Opposition at 13 (citing HRCP 60(b)).

in bringing its Motion for Relief here, nearly five years after D&O 32600 was issued, exceeds a "reasonable time."<sup>40</sup>

Regarding HRCP 60(b)(6), HECO notes that "[s]ubsection (b)(6) is mutually exclusive from subsections (1) through (5)[,]" and that LOL has not articulated an independent basis for application of subsection (b)(6).<sup>41</sup>

HECO also argues that LOL's Motion for Relief fails on the merits of its arguments for the following reasons:

(A) NPM was not late in obtaining the Incidental Take License. LOL's argument is premised on the wrong defined term in the wrong section of the PPA.<sup>42</sup> Furthermore, neither HECO nor NPM

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<sup>40</sup>HECO Opposition at 13-15. HECO acknowledges that LOL argues that NPM's delay in obtaining the Incidental Take License could not have been known at the time D&O 32600 was issued, but counters that LOL would have become aware of this on December 10, 2016, after which nearly three years passed before LOL filed its Motion for Relief. Id. at 14.

<sup>41</sup>HECO Opposition at 15 (citing Citicorp Mortg., Inc. v. Bartolome, 94 Hawaii 422, 437, 16 P.3d 827, 842 (Ct. App. 2000)).

<sup>42</sup>HECO Opposition at 16-19. HECO observes that LOL bases its argument regarding the Incidental Take License on Section 11.2 of the PPA, governing "Land Rights;" however, HECO argues that an Incidental Take License is not a "Land Right" governed by Section 11.2, but rather, a "Governmental Approval" governed by Section 11.1 of the PPA. Id. at 16-17 (Governmental Approvals are subject to a different deadline, which has not yet occurred. Id. at 17, n.9). See also, Application, Exhibit A (Amended and Restated Power Purchase Agreement) at 14 and 17 (containing the distinct PPA definitions for "Government Approvals" and "Land Rights").

has asserted a breach of the PPA,<sup>43</sup> and LOL fails to justify why it should be allowed to allege a breach of the PPA to which LOL is neither a party nor an intended third party beneficiary.<sup>44</sup>

(B) The PPA does not violate the Competitive Bidding Framework; D&O 32600 held that the NPM project was not subject to the Framework. Furthermore, the Framework does not contain any site control requirement.<sup>45</sup>

(C) Applying D&O 32600 prospectively is not “inequitable,” and LOL does not indicate how D&O 32600 may have been different had the Commission conducted a GHG emissions analysis.<sup>46</sup> Furthermore, LOL should be estopped from making this argument based on LOL’s previous statements that wind farms, like the NPM wind facility, have smaller environmental impacts and have less negative climate change impacts.<sup>47</sup>

(D) LOL’s assertions that the PPA’s energy price is too high is unfounded. LOL relies on a single blog entry from 2017 and does not discuss geographic and locational factors specific to

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<sup>43</sup>HECO Opposition at 20.

<sup>44</sup>HECO Opposition at 20-21.

<sup>45</sup>See HECO Opposition at 22.

<sup>46</sup>See HECO Opposition at 2 and 22-25.

<sup>47</sup>See HECO Opposition at 3 and 26-27.



Hawaii's energy costs.<sup>48</sup> HECO further notes that the PPA's energy price was a significant point of discussion in D&O 32600, which LOL failed to timely challenge.<sup>49</sup>

3.

The Consumer Advocate

The Consumer Advocate recommends denying the Motion on procedural grounds.<sup>50</sup>

First, the Consumer Advocate notes that LOL was granted Participant status in the underlying proceeding, yet "did not exercise its full scope of participation in the docket or take issue with the Commission's approval of those PPA terms prospectively in its Statement of Position or after the issuance of D&O No. 32600 in a timely-filed motion for reconsideration under HAR § 16-601-137."<sup>51</sup> In this regard, the Consumer Advocate contends that LOL's Motion for Relief constitutes "a belated, and untimely, motion for reconsideration or rehearing[,]" which the Commission should deny as untimely.<sup>52</sup> As stated by the

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<sup>48</sup>See HECO Opposition at 2-3 and 27.

<sup>49</sup>HECO Opposition at 27-28.

<sup>50</sup>CA Response at 4.

<sup>51</sup>CA Response at 4.

<sup>52</sup>CA Response at 5.

Consumer Advocate, “[a]llowing this motion would set a dangerous precedent by allowing a party to question any prior Commission decision outside of the timelines for appeal set forth in the Commission’s rules of practice and procedure, and thereby undermine the authority of the Commission to make final and effective rulings.”<sup>53</sup>

Second, the Consumer Advocate contends that reliance on the HRCP, including HRCP 60(b) is not supported by LOL’s reference to HAR § 16-601-1, as this rule only applies to situations in which HAR Chapter 16 “is silent.”<sup>54</sup> Here, the Consumer Advocate argues that “resorting to HRCP Rule 60(b) is unnecessary[,]” as “HAR § 16-601, Subchapter 14, provides for *timely* motions for reconsideration, which LOL could have availed itself of after the Commission issued D&O No. 32600 in 2014.”<sup>55</sup> Additionally, the Consumer Advocate notes that LOL could have used HAR § 16-601, Subchapter 5 to file a complaint or request an investigation, or Subchapter 16 to seek a declaratory order about the legal effect of post-D&O 32600 developments.<sup>56</sup> Accordingly, the Consumer Advocate asserts that “LOL is incorrect to argue that

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<sup>53</sup>CA Response at 5.

<sup>54</sup>CA Response at 5-6.

<sup>55</sup>CA Response at 6 (emphasis in the original).

<sup>56</sup>CA Response at 6.

the Commission should look to the HRCF and LOL is also incorrect to file its arguments pursuant to Rule 60(b).”<sup>57</sup>

The Consumer Advocate opposes both LOL’s request for a hearing on its Motion for Relief, as well as a contested case hearing. The Consumer Advocate contends that “[t]he threshold procedural flaws in LOL’s Motion are not trivial, and they should rightly preclude any further substantial resources expended by the Commission or other stakeholders, such as the Consumer Advocate, in this long-closed docket.”<sup>58</sup> Rather, the Consumer Advocate argues that further discussion regarding the procedural appropriateness of LOL’s Motion for Relief can be addressed through written filings, which “should suffice for the presentation of arguments and authorities and will more than adequately afford LOL a fair opportunity to be heard regarding the considerable procedural threshold in these circumstances.”<sup>59</sup>

Similarly, the Consumer Advocate opposes LOL’s request for a contested case hearing, arguing that the underlying proceeding in Docket No. 2013-0423 that considered the PPA was a contested case hearing, such that “LOL’s instant request for a

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<sup>57</sup>CA Response at 6.

<sup>58</sup>CA Response at 6.

<sup>59</sup>CA Response at 6-7.

contested case hearing is an untimely and improper request for rehearing under HAR § 16-601-137, again.”<sup>60</sup>

Finally, while not directly addressing the substantive arguments raised in LOL’s Motion for Relief, the Consumer Advocate questions whether “LOL has fully supported all of its assertions.”<sup>61</sup> Specifically, while the Consumer Advocate agrees that “certain milestones have been missed, . . . [it] also notes that the PPA has terms that allow cure periods for such situations.”<sup>62</sup> Additionally, the Consumer Advocate queries whether LOL’s arguments about violations of the Competitive Bidding Framework are appropriate, given that HECO sought and received a waiver from the Framework for the PPA.<sup>63</sup>

That being said, the Consumer Advocate “offers that the Commission should protect and advance the public interest[,]” and “[i]f it becomes evident and supported that there are breaches in the PPA or other events that are contrary to the public interest, the Commission should seek to timely investigate those matters[,]” pursuant to its authority under HRS § 269-7(a).<sup>64</sup>

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<sup>60</sup>CA Response at 7.

<sup>61</sup>CA Response at 8.

<sup>62</sup>CA Response at 8.

<sup>63</sup>CA Response at 8.

<sup>64</sup>CA Response at 9.

LOL's Replies

In its Reply to HECO's Opposition, LOL argues:

(A) The Tanaka case is not applicable because it involved a motion for reconsideration of an agency decision "premised on facts available at the time the challenged agency action could have been appealed or reconsidered."<sup>65</sup> Conversely, LOL contends that relief pursuant to HRCP 60(b) is warranted "based on facts unavailable at the time" D&O 32600 was issued; i.e., the date when NPM would ultimately obtain the Incidental Take License.<sup>66</sup>

(B) Relief is warranted under HRCP 60(b)(4) because D&O 32600 is void as a result of the Commission's failure to explicitly consider GHG emission impacts, as required by HRS § 269-6(b), which violated LOL's due process.<sup>67</sup>

(C) LOL's request for relief under HRCP 60(b)(5) and (6) are brought within a "reasonable amount of time."<sup>68</sup>

(D) LOL's request for relief under HRCP 60(b)(6) is not a "calculated and deliberate" choice to waive a timely appeal,

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<sup>65</sup>LOL HECO Reply at 1-2.

<sup>66</sup>LOL HECO Reply at 2.

<sup>67</sup>LOL HECO Reply at 3.

<sup>68</sup>LOL HECO Reply at 4.

since LOL did not know the pertinent facts at the time of the statutory appeal period after D&O 32600 was issued.<sup>69</sup>

(E) The Incidental Take License is a "Land Right" under Section 11.2 of the PPA because it "is the functional equivalent of an easement."<sup>70</sup>

(F) The delay in NPM obtaining the Incidental Take License is "inapposite to [LOL's] claims to relief," as LOL is not asserting this delay "as a breach of contract issue between two parties[,] but rather as a violation of the Commission's approval."<sup>71</sup>

(G) The Commission's approval of a waiver from the Competitive Bidding Framework "means that HECO and NPM's adherence to representations to the Commission, including as to the Amended PPA's land rights requirements, are to be strictly construed[,] such that NPM's delay in obtaining the Incidental Take License should void the PPA "by its own terms."<sup>72</sup>

(H) "Wind energy costs are properly raised in the motion for relief" because "[w]ind is generally one of the cheapest forms of energy in Hawaii, but not for this project . . . .

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<sup>69</sup>LOL HECO Reply at 4-5.

<sup>70</sup>LOL HECO Reply at 5.

<sup>71</sup>LOL HECO Reply at 5.

<sup>72</sup>LOL HECO Reply at 6-7.

[and] [t]he analysis is project specific and not premised on conditions for other projects.”<sup>73</sup>

(I) Finally, LOL reiterates its argument that D&O 32600 is void because the Commission did not consider GHG emissions as part of its decision, and therefore denied LOL due process.<sup>74</sup>

In its Reply to the Consumer Advocate’s Response, LOL argues:

(A) It is necessary for the Commission to turn to the HRCP for guidance, because reconsideration under HAR § 16-601-137 “does not consider the specific facts that gave rise to [LOL’s Motion for Relief],” (presumably referring to NPM’s delay in obtaining the Incidental Take License).<sup>75</sup>

(B) Contrary to the Consumer Advocate’s assertion, applying HRCP 60(b) to this situation “would not ‘set a dangerous precedent by allowing a party to question any prior Commission decision outside of the timelines for appeal’” because “HRCP 60 covers a different set of procedural and factual circumstances than a HRCP Rule 59, Motion for New Trial/Reconsideration with the similar ten day deadline.”<sup>76</sup>

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<sup>73</sup>LOL HECO Reply at 7.

<sup>74</sup>LOL HECO Reply at 7.

<sup>75</sup>LOL CA Reply at 1-2.

<sup>76</sup>LOL CA Reply at 2-3. HRCP Rule 59 governs motions for new trials/reconsideration in the Circuit Courts and was not previously raised by LOL in its Motion for Relief or HECO’s

(C) It is important for the Commission to clarify the standards by which motions for relief may be brought, given that such motions are not directly addressed by the Commission's rules.<sup>77</sup>

(D) A petition for a declaratory order under HAR § 16-601, Subchapter 16 may be prohibited under Citizens Against Reckless Development v. Zoning Bd. of Appeals, 114 Hawaii 184, 159 P.3d 143 (2007) ("CARD").<sup>78</sup>

(E) Notwithstanding the Consumer Advocate's suggestion that the Commission could open an investigation into potential breaches of the PPA, LOL counters that the Commission has not, to date, opened an investigation into the PPA.<sup>79</sup>

## 5.

### HECO's Reply

In its Reply, HECO reiterates its arguments raised in its Opposition, which HECO contends LOL has failed to sufficiently address in its Reply. Ultimately, HECO continues to assert its

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Opposition or the Consumer Advocate's Response. The Commission assumes that LOL intended to refer to HAR § 16-601-137, which governs reconsideration of Commission decisions and orders.

<sup>77</sup>LOL CA Reply at 3.

<sup>78</sup>LOL CA Reply at 4 (citing CARD).

<sup>79</sup>LOL CA Reply at 4.



primary argument that the Commission lacks jurisdiction over LOL's Motion for Relief under the holding in Tanaka, which, HECO argues, LOL has failed to distinguish.<sup>80</sup>

6.

The Consumer Advocate's Reply

In its Reply, the Consumer Advocate submits that LOL's Motion for Relief is still, in substance, an untimely motion for reconsideration of D&O 32600.<sup>81</sup> The Consumer Advocate argues that D&O 32600 is not void, and reiterates its concern that "LOL's Motion presents a dangerous precedent" in that it represents a docket party's question or challenge of the validity of a prior decision or ruling, which could result in further retroactive challenges to final Commission decisions that occur "substantially after-the-fact."<sup>82</sup> Finally, the Consumer Advocate states that "if later facts or factors become available that are not consistent with the facts and factors that were available when an earlier decision and order was filed by the Commission, the Commission could act upon those new facts or factors, if it is in the public interest to do so[,] " by, for example, opening an investigation

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<sup>80</sup>See HECO Reply at 2-4.

<sup>81</sup>See CA Reply at 2-5.

<sup>82</sup>See CA Reply at 7-11.

into whether there has been a breach of the PPA that should be addressed.<sup>83</sup>

## II.

### DISCUSSION

#### A.

#### The Commission Lacks Jurisdiction To Rule On LOL's Motion

Hawaii courts have previously ruled that:

The law requires strict compliance with statutes creating the right to appeal from administrative decisions. The time established by a statute for filing an appeal is mandatory, and the timely filing of a notice of appeal is fundamental to the court's jurisdiction to review an agency's decision. Where the statutory time requirement for filing a notice of appeal has not been met, the appeal must be dismissed.<sup>84</sup>

In Tanaka, the Hawaii Intermediate Court of Appeals ("ICA") expressly held that a resident's failure to timely appeal an agency decision consequently deprived that agency of

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<sup>83</sup>CA Reply at 11-12.

<sup>84</sup>Korean Buddhist Dae Won Sa Temple of Hawaii, Inc. v. Zoning Bd. of Appeals, 9 Haw.App. 298, 303, 837 P.2d 311, 313-14 (1992) (internal citations omitted), cert. granted, 73 Haw. 626, 834 P.2d 1315, cert. dismissed, 74 Haw. 651, 843 P.2d 144 (1992), overruled on other grounds, Rivera v. Department of Labor and Indus. Relations, 100 Hawaii 348, 60 P.3d 298 (2002) (application of HRCP 6).

jurisdiction to hear subsequent arguments related to the same underlying matter.

In Tanaka, the Department of Hawaiian Home Lands ("DHHL") cancelled Tanaka's lease when he and his wife were convicted of possessing drugs in their residence. As part of the process to cancel Tanaka's lease, DHHL provided a contested case hearing for Tanaka, which was presided over by a hearings officer who recommended that DHHL cancel the lease.<sup>85</sup> DHHL notified Tanaka that it would convene to consider the hearings officer's recommendation and allow Tanaka an opportunity to present arguments on his behalf. Tanaka appeared and, after hearing the matter, DHHL issued an order adopting the hearings officer's recommendation. DHHL then told Tanaka that he had ten days to submit a request for reconsideration and thirty days to initiate an appeal to the Circuit Court.<sup>86</sup> Tanaka's mother submitted a timely request for reconsideration, which was denied. DHHL sent Tanaka a copy of the order denying Tanaka's mother's request for reconsideration and again informed him that he had thirty days to request judicial review (the "December 1998 Final Order"). Tanaka did not take action within the thirty day period.<sup>87</sup>

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<sup>85</sup>Tanaka, 106 Hawaii at 247-48, 103 P.3d at 407-08.

<sup>86</sup>Tanaka, 106 Hawaii at 248, 103 P.3d at 408.

<sup>87</sup>Tanaka, 106 Hawaii at 248, 103 P.3d at 408.

Subsequently, Tanaka's conviction for drug possession was vacated. As a result, sixteen months after DHHL's thirty-day period had expired, Tanaka petitioned DHHL to review his case and re-instate his lease based on his vacated conviction.<sup>88</sup>

DHHL met to consider Tanaka's request and ultimately denied Tanaka's request for reconsideration. Tanaka appealed DHHL's denial to the Circuit Court, who ruled in favor of DHHL. Tanaka then appealed to the ICA.<sup>89</sup>

On appeal, the ICA dismissed Tanaka's appeal on procedural grounds, holding:

While Tanaka raises a number of issues on appeal, we do not reach them as his failure to appeal from the Commission's December 1998 Final Order [(denying Tanaka's mother's request for reconsideration)] left the Commission without jurisdiction to act on Tanaka's 2000 and 2001 requests for reconsideration [(made after his conviction was vacated)]. Moreover, the Commission had no jurisdiction to hold the November 2001 Reconsideration Request Proceeding [(where DHHL met to consider Tanaka's belated request for reconsideration)] because it was not a separate 'contested case hearing' under Hawaii Revised Statutes (HRS) § 91-14(a).<sup>90</sup>

In reaching this conclusion, the ICA stated:  
"[a] party's failure to timely request an agency review hearing

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<sup>88</sup>Tanaka, 106 Hawaii at 248, 103 P.3d at 408.

<sup>89</sup>Tanaka, 106 Hawaii at 249, 103 P.3d at 409.

<sup>90</sup>Tanaka, 106 Hawaii at 249, 103 P.3d at 409 (emphasis added).

not only bars the agency from considering that request, but also precludes the circuit court from considering an appeal of the administrative decision[,]” and that “[t]he agency may not enlarge its powers by waiving or extending mandatory time limits.”<sup>91</sup>

As the ICA succinctly summarized the issue:

Thus, pursuant to the provisions of the [Hawaii Administrative Procedures Act, HRS Chapter 91 (“HAPA”)] and the HAR, if Tanaka wished a review of the Commission’s December 1998 Final Order, his only option was to note his appeal to the circuit court within thirty days of receiving service of the December 1998 Final Order. Having failed to do so, the Commission lost the authority to take any further action regarding its cancellation of Tanaka’s lease inasmuch as the [HAPA] and the HAR do not provide for any extension of time to appeal, nor any vehicle for collateral attack of the December 1998 Final Order. Tanaka’s requests, in May 2000 and August 2001, for “review” and “reinstatement” of his lease, were simply not requests the Commission could act upon.<sup>92</sup>

Regarding LOL’s Motion for Relief, HAR § 16-601-137 provides for motions for reconsideration or rehearing of Commission decisions and orders. Under HAR § 16-601-137, any such motion “shall be filed within ten days after the decision or order is served upon the party, setting forth specifically the grounds

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<sup>91</sup>Tanaka, 106 Hawaii at 249, 103 P.3d at 409.

<sup>92</sup>Tanaka, 106 Hawaii at 250-51, 103 P.3d at 410-11 (emphasis added).

on which the movant considers the decision and order unreasonable, unlawful, or erroneous.”

HRS § 269-15.5 further provides, in relevant part, that “[e]xcept as otherwise provided in this chapter, an appeal from an order of the public utilities commission under this chapter shall lie, subject to chapter 602, in the manner provided for civil appeals from the circuit courts.” (HRS Chapter 602 provides for appeals from the circuit court to the ICA.<sup>93</sup>) Regarding “the manner for civil appeals from the circuit courts,” under the HRAP 4(a)(1), “[w]hen a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order.” HRAP 4(a)(4) allows for a brief extension to file a notice of appeal after the expiration of the prescribed time upon “showing of excusable neglect,” “[h]owever, no such extension shall exceed 30 days past the prescribed time.” (Emphasis added).

LOL neither sought reconsideration of D&O 32600 with the Commission, nor did it file a notice of appeal of D&O 32600 with the ICA pursuant to HRS § 269-15.5.

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<sup>93</sup>See HRS § 602-57. In 2016, the Legislature amended this process by adding HRS § 269-15.51, which provides for appeal of Commission contested cases directly to the Hawaii Supreme Court, rather than the ICA. However, for purposes of analyzing LOL’s Motion for Relief, the applicable statute that existed at the time D&O 32600 was issued was HRS § 269-15.5, as stated above.

Accordingly, pursuant to the holding established in Tanaka, the Commission lacks jurisdiction to address LOL's Motion for Relief. As in Tanaka, LOL had notice of the final order in the underlying Commission proceeding, i.e., D&O 32600, and did not timely file for reconsideration with the Commission or file an appeal with the ICA.

The Commission is not persuaded by LOL's attempts to distinguish Tanaka.<sup>94</sup> LOL contends that Tanaka involved a case where "an untimely-filed motion for reconsideration [was] premised on facts available at the time the challenged agency action could have been appealed or reconsidered[,]"<sup>95</sup> but, upon review of the Tanaka decision, this does not appear to be the case. In Tanaka, the "untimely-filed motion for reconsideration" appears to be Tanaka's petition for DHHL to review his case and re-instate his lease following the vacating of his drug possession conviction.<sup>96</sup> Tanaka's conviction was vacated in "November 1999."<sup>97</sup> Thus, the facts underlying Tanaka's "untimely-filed motion for reconsideration," i.e., the vacating of his conviction, were not "facts available at the time the challenged agency action could

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<sup>94</sup>See LOL HECO Reply at 1-3.

<sup>95</sup>LOL HECO Reply at 1-2.

<sup>96</sup>See Tanaka, 106 Hawaii at 248, 103 P.3d at 408.

<sup>97</sup>Tanaka, 106 Hawaii at 248, 103 P.3d at 408.

have been appealed or reconsidered,” as this information did not exist during the thirty-day appeal period following the DHHL’s denial of Tanaka’s mother’s motion for reconsideration, which was issued on December 31, 1998.<sup>98</sup> If anything, the facts in Tanaka are more closely akin to the circumstances here, in that NPM’s delay in obtaining the Incidental Take License was not known at the time the Commission issued D&O 32600, similar to how the vacating of Tanaka’s conviction was not known at the time DHHL issued its December 1998 Final Order.

Moreover, this ignores that fact that LOL also had “facts available” in order to file a timely appeal. LOL’s arguments regarding the sufficiency of the Commission’s analysis of GHG emissions, pursuant to HRS § 269-6(b), as well as the reasonableness of the energy pricing of the PPA, all could have been raised when D&O 32600 was issued.<sup>99</sup> Because LOL did not timely

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<sup>98</sup>See Tanaka, 106 Hawaii at 248, 103 P.3d at 408 (noting that the final DHHL order denying Tanaka’s mother’s motion for reconsideration was issued on December 31, 1998, but “Tanaka, however, did not request judicial review within thirty days.”) Thirty days after December 31, 1998, would be approximately January 30, 1999, far before the “fact” of Tanaka’s vacated conviction became known in November 1999.

<sup>99</sup>In addition, LOL’s arguments regarding the PPA’s energy pricing appear to argue for evaluating the PPA’s energy pricing using today’s wind energy prices, rather than wind energy pricing in 2014 when the Commission issued D&O 32600, which would be improper, as: (1) current wind energy prices are outside the scope of the record developed for D&O 32600; and (2) LOL did not file a



appeal these issues, this leaves the Commission without jurisdiction to hear them now, as in Tanaka.

On this point, LOL states that it “is not remiss for not having filed a motion for relief earlier as case law fully clarifying its due process rights was not in existence until May 10, 2019.” (the Commission assumes that “May 10, 2019” refers to the date of the Hawaii Supreme Court’s decision in In re Haw. Elec. Light Co., Inc., 145 Hawaii 1, 445 P.3d 673 (May 10, 2019)).<sup>100</sup>

The Commission does not find this argument convincing. As noted by the Consumer Advocate in its Reply, LOL “is the same party that sought the Hawaii Supreme Court ruling [in In re Haw. Elec. Light Co., Inc.],” and “[i]f LOL did not know it could file a motion for reconsideration related to the NPM project until May 2019, how did LOL know it could appeal the Commission’s decision relating to the Hu Honua project in Docket No. 2017-0122 [the decision underlying In re Haw. Elec. Light Co., Inc.]?”<sup>101</sup>

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timely motion for reconsideration seeking to introduce new evidence. See HAR § 16-601-139.

<sup>100</sup>LOL HECO Reply at 3.

<sup>101</sup>See CA Reply at 6. LOL filed its notice of appeal in In re Haw. Elec. Light Co., Inc. with the Hawaii Supreme Court on August 26, 2017. Similarly, it is unclear how the Commission allegedly violated LOL’s due process rights to a clean and healthful environment by not conducting an analysis of GHG emissions in D&O 32600, when, as LOL acknowledges, the recognition and scope of this right was not established until May 10, 2019,

The Commission concurs with this assessment; if LOL believed its due process rights had been violated by D&O 32600, it should have timely appealed that issue then. Regardless if subsequent caselaw further clarified this issue, this does not retroactively toll the statutory appeal period or justify a delay in bringing a timely appeal. Under LOL's argument, all regulatory and statutory appeal periods would be essentially meaningless, as a petitioner or appellant could simply claim that they were not fully aware of their due process rights during the period within which they had to file an appeal.

While LOL also argues that the timing of the Incidental Take License was not knowable at the time of D&O 32600, and thus warrants relief under HRCP 60(b)(4), as discussed in Section II.C below, LOL lacks standing to assert a breach of the PPA.

LOL also argues that "HECO fails to explain why the issue of whether an appellate court would have jurisdiction to hear an appeal of this Commission's decision is relevant to the analysis of whether the Commission has the power to grant relief from a previous order[;]"<sup>102</sup> however, this appears to misinterpret the holding in Tanaka. The ICA in Tanaka ruled that Tanaka's failure

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when the Hawaii Supreme Court issued its decision in In re Haw. Elec. Light Co., Inc.

<sup>102</sup>LOL HECO Reply at 2.

to timely appeal the DHHL's decision deprived both the agency and the reviewing court of jurisdiction to hear further matters related to Tanaka's underlying case.<sup>103</sup> While the Commission does not make any findings here regarding a reviewing court's jurisdiction to consider this matter, it is evident to the Commission that under Tanaka, LOL's failure to timely file an appeal deprived the Commission of jurisdiction to hear further matters raised by LOL in this proceeding.<sup>104</sup>

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<sup>103</sup>See Tanaka, 106 Hawaii at 249, 103 P.3d at 409 ("A party's failure to timely request an agency review hearing not only bars the agency from considering that request, but also precludes the circuit court from considering an appeal of the administrative decision.").

<sup>104</sup>See Tanaka, 106 Hawaii at 250, 103 P.3d at 410 ("Thus, pursuant to the provisions of the HAPA and the HAR, if Tanaka wished a review of the Commission's December 1998 Final Order, his only option was to note his appeal to the circuit court within thirty days of receiving service of the December 1998 Final Order. Having failed to do so, the Commission lost the authority to take any further action regarding its cancellation of Tanaka's lease inasmuch as the HAPA and the HAR do not provide for any extension of time to appeal, nor any vehicle for collateral attack of the December 1998 Final Order.") (emphasis added).

Tanaka also argued that his belated request for reconsideration constituted a "new" contested case, based on the circumstances of his vacated conviction. However, the ICA was not persuaded, holding that "it is the substance of the pleading that controls, not its nomenclature[,]" and that the "crux of Tanaka's request was that the Commission should reconsider its decision to cancel his lease based on new evidence . . . . [t]hese requests involved the same lease and the same grounds - his illicit drug activity." 106 Hawaii at 251-52, 103 P.3d at 411-12. Thus, "[t]here is no legitimate ground upon which to base a conclusion that these requests constituted a new case." Id.

Consequently, under Tanaka, the Commission finds that it lacks jurisdiction to hear LOL's Motion for Relief, and denies it as such.

B.

Alternatively, LOL's Motion For Relief Constitutes An Untimely  
Motion For Reconsideration Of Order No. 32600

Assuming, arguendo, that the Commission were to distinguish the facts of this case from Tanaka and find that it has jurisdiction over LOL's Motion for Relief, LOL's Motion still must be denied as an untimely motion for reconsideration of D&O 32600.

While LOL has styled its request as a Motion for Relief, the Commission finds that it contains, in substance, arguments that address findings in D&O 32600, which LOL could have raised in a timely motion for reconsideration.

In the underlying proceeding, LOL's scope of participation included addressing the issues of: (1) "Whether the Commission should approve HECO's request for a waiver from [the Competitive Bidding Framework;" and (2) "Whether the purchased power arrangements under the PPA, pursuant to which HECO purchases energy on an as-available basis from Na Pua Makani are prudent and

in the public interest.”<sup>105</sup> Accordingly, LOL’s arguments regarding the reasonableness of the PPA’s terms, including the energy pricing, as well as the Commission’s express consideration of GHG emissions, could all have been raised by LOL in the underlying docket proceeding.

LOL did not address the issues it now raises in its Motion for Relief at the time it filed its Statement of Position (“SOP”) in the underlying proceeding. In particular, LOL did not raise any issues related to GHG emissions, climate change, or other environmental impacts. Furthermore, after D&O 32600 was issued, LOL did not timely seek reconsideration alleging that the Commission did not adequately consider GHG emissions pursuant to HRS § 269-6(b), that the energy pricing was too high, or that the PPA was not prudent or in the public interest.

As noted above, HAR § 16-601-137 requires that a motion for reconsideration be filed within ten days after service of the subject decision or order. Here, it is undisputed that LOL did not timely file a motion for reconsideration of D&O 32600, nor did it seek an enlargement of time to file a motion for reconsideration of D&O 32600 pursuant to HAR § 16-601-23. Accordingly, even if the Commission distinguished this matter from the holding in Tanaka, LOL’s Motion for Relief would be dismissed as untimely.

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<sup>105</sup>Order No. 31998 at 4 and 20-21.

While NPM's delay in obtaining the Incidental Take License did not occur until after the ten-day reconsideration period under HAR § 16-601-137 had expired, this is not relevant under the circumstances, as LOL lacks standing to assert a breach of the PPA, and thus could not have brought a motion for reconsideration based on NPM's alleged failure to timely obtain an Incidental Take License in any event (this issue is discussed further in Section II.C., below). Accordingly, any argument by LOL that the issuance of the Incidental Take License somehow tolled the HAR § 16-601-137 reconsideration deadline is unpersuasive.

Furthermore, even if the issuance of the Incidental Take License did toll the reconsideration period under HAR § 16-601-137, the Incidental Take License was issued on May 16, 2018, and LOL waited nearly a year and a half until filing its Motion for Relief on September 11, 2019, far beyond the ten-day period provided in HAR § 16-601-137.<sup>106</sup> The nearly year-and-a-half delay on LOL's part undermines the timeliness of LOL Motion for

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<sup>106</sup>In its Reply to HECO's Opposition, LOL contends that HECO exaggerates the time it took LOL to file its Motion for Relief, using the PPA's deadline for obtaining "Land Rights" (December 10, 2016), rather than the date NPM ultimately obtained the Incidental Take License (May 16, 2018). LOL HECO Reply at 4; see also HECO Opposition at 14. However, even under LOL's argument, LOL waited well over ten days after NPM received its Incidental Take License to file its Motion for Relief.

Relief, as it represents an unreasonable amount of time to wait to bring a motion for reconsideration after the underlying act.

C.

LOL Lacks Standing To Assert A Breach Of The PPA

It is undisputed that LOL is not a party to the PPA. In Hawaii, “[g]enerally ‘third parties do not have enforceable contract rights. The exception to the general rule involves intended third party beneficiaries.’”<sup>107</sup> Thus, the inquiry turns to whether LOL is an intended third party beneficiary of the PPA.

As to what constitutes an “intended third-party beneficiary,” the Hawaii Supreme Court has held:

A third party beneficiary is “[o]ne for whose benefit a promise is made in a contract but who is not a party to the contract.” Black’s Law Dictionary 1480 (6th ed. 1990) (quoting Chitlik v. Allstate Ins. Co., 34 Ohio App.2d 193, 299 N.E.2d 295, 297 (1973). “The rights of the third party beneficiary must be limited to the terms of the promise,” and this promise “may be express or it may be implied from the circumstances.” Remington Typewriter Co. v. Kellog, 19 Haw. 636, 640 (1909) (internal quotation marks and citation omitted).

Furthermore, “a prime requisite to the status of ‘third party beneficiary’ under a contract

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<sup>107</sup>Velasco v. Security Nat. Mortg. Co., 823 F.Supp.2d 1061, 1067 (D. Hawaii 2011) (citing Ass’n of Apartment Owners of Newtown Meadows v. Venture 15, Inc., 115 Hawai’i 232, 167 P.3d 225, 262 (2007) (citing Pancakes of Haw., Inc. v. Pomare Props. Corp., 85 Hawai’i 300, 944 P.2d 97, 106 (Haw.App. 1997)).

is that the parties to the contract must have intended to benefit the third party, who must be something more than a mere incidental beneficiary." Black's Law Dictionary at 1480 (quoting McKinney v. Davis, 84 N.M. 352, 353, 503 P.2d 332, 333 (1972)).<sup>108</sup>

There is no evidence that LOL is an intended third party beneficiary of the PPA. The PPA itself, at Section 29.22 expressly provides:

29.22 No Third Party Beneficiaries. Nothing expressed or referred to in this Agreement will be construed to give any person or entity other than the Parties<sup>109</sup> any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement. This Agreement and all of its provisions and conditions are for the sole and exclusive benefit of the Parties and their successors and permitted assigns.

In reviewing a contract, "[t]he court's objective is 'to ascertain and effectuate the intention of the parties as manifested by the contract in its entirety.'"<sup>110</sup> "If there is any doubt, the interpretation which 'most reasonably reflects the intent of

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<sup>108</sup>Pancakes of Hawaii, 85 Hawaii at 309, 944 P.2d at 106.

<sup>109</sup>The PPA defines "Parties" as "Seller and the Company, collectively." PPA at 15. "Seller" is further defined as "Na Pua Makani," id. at 1 and 20; "Company" is further defined as "Hawaiian Electric Company, Inc." Id. at 1 and 5.

<sup>110</sup>Hawaiian Ass'n of Seventh-Day Adventists v. Wong, 130 Hawaii 36, 45, 305 P.3d 452, 461 (2013) (citing Brown v. KFC National Management Co., 82 Hawaii 226, 240, 921 P.2d 146, 160 (1996)).



the parties' must be chosen."<sup>111</sup> Section 29.22 of the PPA clearly expresses that the parties to the PPA (i.e., HECO and NPM), did not intend for LOL, or any other entity, to be considered a third party beneficiary to the PPA.

As LOL is neither a party nor an intended third-party beneficiary to the PPA, it lacks standing to assert an alleged breach of the PPA. Accordingly, any arguments asserted by LOL arising from NPM's delay in obtaining the Incidental Take License in accordance with the provisions of the PPA fail as a matter of law.

While LOL states in its Reply to HECO's Opposition that "the failure to comply with approved amended PPA [sic] is not being analyzed as a breach of contract between private parties[,], but rather, as a violation of the Commission's approval[,]"<sup>112</sup> the Commission does not find this persuasive. In approving the PPA, the Commission did not impose a specific condition that NPM obtain the Incidental Take License by a specific date; rather, the Commission approved the PPA as a whole, which included the various contractual mechanisms and remedies within the PPA to

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<sup>111</sup>University of Hawaii Professional Assembly on Behalf of Daeufer v. University of Hawaii, 66 Haw. 214, 219, 659 P.2d 720, 724 (1983) (citation omitted).

<sup>112</sup>LOL HECO Reply at 5.

address any such delays.<sup>113</sup> Accordingly, it is unclear what LOL means what it contends that NPM's delay in obtaining the Incidental Take License is a "violation of the Commission's approval[,]" as the Commission's approval in D&O 32600 included the rights and remedies in the PPA to address any such delays or violations which, evidently, neither HECO nor NPM has elected to invoke.<sup>114</sup>

Furthermore, even assuming arguendo that LOL had standing to assert a breach of the PPA, the plain language of the PPA does not support LOL's position. Critical to LOL's argument is that the Incidental Take License is a "Land Right" under section 11.2 of the PPA.<sup>115</sup> However, the Incidental Take License is better defined as a "Governmental Approval," rather than a "Land Right," under the PPA.<sup>116</sup> The Incidental Take License is:

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<sup>113</sup>See D&O 32600. While the Commission did modify the PPA in D&O 32600, this was in regards to a proposed "evergreen" provision under which the PPA could be renewed, and had nothing to do with the PPA provisions governing "Land Rights" or any related contractual remedies. See id. at 74-77.

<sup>114</sup>See HECO Opposition at 20.

<sup>115</sup>See LOL Motion at 4.

<sup>116</sup>See PPA at 14 (defining "Land Rights" as "All easements, rights of way, licenses, leases, surface use agreements and other interests or rights in real estate.") and 11 (defining "Government Approvals" as "All permits, licenses, approvals, certificates, entitlements and other authorizations issued by Governmental Authorities, as well as any agreements with Governmental Authorities, required for the construction, ownership, operation and maintenance of the Facility and the Company-Owned Interconnection Facilities, and all amendments,

(1) a license; (2) issued by the Board of Land and Natural Resources, a "Governmental Authority," as defined by the PPA;<sup>117</sup> and (3) required for the construction, ownership, operation and maintenance of the Project.<sup>118</sup>

As the PPA's definition of "Governmental Approvals" more specifically describes the pertinent characteristics of the Incidental Take License, it is a more reasonable interpretation of the PPA to construe the Incidental Take License as a "Governmental Approval," rather than a "Land Right." Consequently, even if LOL had standing to assert a breach of the PPA, LOL's argument, which relies on section 11.2 of the PPA, is not persuasive under the plain language of the PPA.

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modifications, supplements, general conditions and addenda thereto.")(internal citations omitted).

<sup>117</sup>See PPA at 11.

<sup>118</sup>Given the different requirements of Section 11.1 and Section 11.2 of the PPA, including the deadlines provided in Section 11.2 for Land Rights, but not in Section 11.1 for Governmental Approvals, the Incidental Take License cannot be both a "Land Right" and a "Governmental Approval," but must be one or other. As held by the Hawaii Supreme Court, a contract "must be construed as a whole. . . . [a]nd in case of inconsistency between general and specific provisions, the specific controls the general." Kaiser Hawaii Kai Development Co. v. Murray, 49 Haw. 214, 228, 412 P.2d 925, 932 (1966) (citations omitted).

D.

It Is Unnecessary For The Commission To Look To  
The HRCF For Guidance Under These Circumstances

In its Motion for Relief, LOL raises a number of arguments pursuant to HRCF 60(b). LOL cites to HAR § 16-601-1 as support for turning to the HRCF for guidance. HAR § 16-601-1 provides, in relevant part, that "[w]henver this chapter is silent on a matter, the Commission or hearings officer may refer to the Hawaii Rules of Civil Procedure for guidance."

The Commission finds that the HAR is not silent on the matters raised in LOL's Motion.<sup>119</sup> As discussed above, HAR § 16-601-137 provides for a process by which a party or a participant to a docket may seek reconsideration of a Commission decision, order, or requirement, which LOL did not utilize. (To the extent LOL argues that HAR § 16-601-137 does not address the circumstances related to NPM's delay in obtaining the Incidental Take License, this is irrelevant under the circumstances, as discussed above, because LOL does not possess standing to assert a breach of the PPA.)<sup>120</sup>

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<sup>119</sup>See CA Response at 5-6.

<sup>120</sup>Additionally, as noted in the Consumer Advocate's Response, LOL had other available means under the HAR to raise the issues it now seeks to address in its Motion for Relief, such as filing a complaint under HAR § 16-601, Subchapter 5, or filing a petition for declaratory relief under HAR § 16-601, Subchapter 16. CA Response at 6. While LOL questions whether a petition for declaratory relief would be permissible under the circumstances in

Furthermore, even if HAR § 16-601-137 was silent on the matters raised in LOL's Motion for Relief, HAR § 16-601-1 merely permits the Commission to turn to the HRCP for guidance in specific situations. While the Commission may consider the standards and judicial policies underlying HRCP 60(b), the Commission is not obligated to adopt HRCP 60 or strictly apply it to LOL's Motion. Given the circumstances here, including LOL's failure to timely move for reconsideration or file an appeal of D&O 32600, as well as the fact that LOL lacks standing to assert a breach of the PPA, the Commission does not find it necessary to look to the HRCP for guidance.

E.

#### Conclusion

As set forth above, the Commission denies LOL's Motion for Relief on the procedural grounds that it lacks jurisdiction over this Motion. In the alternative, the Commission further finds that LOL's Motion for Relief constitutes an untimely motion for reconsideration of D&O 32600, LOL lacks standing to assert a breach of the PPA (and even if LOL had standing, an Incidental Take

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light of the CARD holding, LOL CA Reply at 3-4, this is speculative, as LOL did not seek declaratory relief, and, furthermore, this did not affect LOL's ability to file a complaint under HAR § 16-601, Subchapter 5.

License does not constitute a "Land Right" as defined under the PPA as discussed above), and it is unnecessary for the Commission to turn to HRCP 60(b) for guidance, all of which support denial of LOL's Motion. Consequently, the Commission does not address the other arguments raised in LOL's Motion for Relief.

Notwithstanding the above, the Commission is aware of the significant public interest and concern that this Project has generated, particularly by those who reside in the neighboring communities. While the Commission denies LOL's Motion based on the legal grounds asserted in the Motion, the Commission is carefully monitoring the Project development and intends to follow up with HECO and Na Pua Makani, outside of this proceeding, to inquire whether any violations of the PPA have occurred, and if so, will take appropriate action.

### III.

#### ORDERS

##### THE COMMISSION ORDERS:

1. LOL's Motion for Relief, filed September 11, 2019, is denied for the reasons set forth above.

2. This docket remains closed, unless otherwise ordered  
by the Commission.

DONE at Honolulu, Hawaii APRIL 16, 2020.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By James P. Griffin  
James P. Griffin, Chair

By Jennifer M. Potter  
Jennifer M. Potter, Commissioner

By Leodoloff R. Asuncion, Jr.  
Leodoloff R. Asuncion, Jr., Commissioner

APPROVED AS TO FORM:

Mark Kaetsu  
Mark Kaetsu  
Commission Counsel

2013-0423.ljk

CERTIFICATE OF SERVICE

Pursuant to Order No. 37043, the foregoing order was served on the date it was uploaded to the Public Utilities Commission's Document Management System and served through the Document Management System's electronic Distribution List.



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COMMISSION

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